PRASIT PUNYANG

v.

PP

COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
ROHANA YUSUF JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: R-05-252-09-2011]
4 OCTOBER 2013

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Trafficking in 937.5g of cannabis - Death sentence - Drugs found on appellant's body and hidden in boat - Whether drugs in boat belonged to appellant - Whether appellant had knowledge of drugs in boat - Appellant denied having knowledge of cannabis hidden in boat - Failure to adequately consider cautioned statement of appellant which was exculpatory in nature - Whether sufficient to set aside conviction and sentence*

EVIDENCE: *Statement - Cautioned statement - Failure of trial judge to consider all evidence - Caution statement exculpatory in nature - Whether inadequately considered by trial judge - Whether amounted to non-direction - Whether there was a substantial miscarriage of justice - Whether there was sufficient evidence to justify conviction - Criminal Procedure Code, s. 182A(1)*

A police raiding team and PW5 went to the scene to conduct an operation on drug trafficking activities. Earlier, the police had arrested one Yahya Zainol ('PW4') on suspicion that he was in possession of dangerous drugs. At the police station, PW4 was asked to buy cannabis and he agreed. PW4 then made a telephone call to Thailand and contacted one 'Mail'. PW4 was then told by 'Mail' that the drugs would be ready for collection in Kuala Perlis. According to PW5, a boat was seen approaching the platform and there was no one else in the boat except the appellant. When the boat then stopped at the platform, PW5 and his team rushed to the boat and detained the appellant. A body search on the appellant revealed a slab of dried plant material wrapped in a transparent plastic packet from a bag worn at the appellant's waist. Suspecting the contents to be cannabis, PW5 seized it. Subsequently, PW5 alleged that the appellant also pointed to cannabis hidden in the boat. The appellant was then charged and tried in the High Court for trafficking in dangerous drugs, namely 937.5g of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). At the conclusion of the case for the prosecution, the Judicial Commissioner ('JC') came to the finding that the prosecution had made out a *prima facie* case against the appellant and called upon the appellant to enter his defence. In his defence, the appellant admitted that he knew of the cannabis found in a brown bag worn at his waist but the appellant vehemently denied of pointing or having knowledge of the presence of the cannabis hidden in the boat. In support of his defence, the appellant tendered a cautioned statement that he made in the course of police investigation. However, the JC at the conclusion of the trial convicted the appellant and sentenced him to the mandatory death penalty. Hence the appeal. On appeal, the appellant contended that the JC had erred in failing to adequately consider the cautioned statement of the appellant, which was exculpatory in nature. The appellant argued that the failure of the JC to take into consideration the cautioned statement was a serious non-direction which amounted to a misdirection rendering the conviction of the appellant to be unsafe. The appellant also contended that 'Mail' was never called by the prosecution and although the appellant had mentioned the name of 'Mail' in his cautioned statement, no investigation was carried out by the police pertaining to 'Mail'. In opposing this appeal, the Deputy Public Prosecutor argued that even though there has been a non-direction, nevertheless that had not occasioned a substantial miscarriage of justice to the appellant and there were sufficient evidence to justify the conviction.

Held (allowing appeal; acquitting and discharging appellant) Per Azahar Mohamed JCA delivering the judgment of the court:

(1) There was merit in the contention of the appellant. In accordance with the provisions of s. 182A(1) of the Criminal Procedure Code, it was the duty of the JC, at the conclusion of the trial, to consider all the evidence adduced before him. The legislature had advisedly used the term "all the evidence". The emphasis must be on the word 'all'. The cautioned statement tendered by the appellant was evidence which the JC should have taken into consideration in order to make a finding whether or not the prosecution had proved its case beyond reasonable doubt. (para 8)

(2) The JC must consider carefully whether the cautioned statement was capable of raising a reasonable doubt on the prosecution case. The appellant's cautioned statement was recorded a day after the arrest of the appellant. It was important, therefore, to point out that the appellant had mentioned the basic facts of his defence at a very early stage of the police investigation against him. Accordingly, the defence of the appellant in the present case was not something that was sprung for the first time in the defence case. (para 11)

(3) The evidence led by the prosecution left questions unanswered, especially the role of 'Mail'. The fact that the defence was not a recent fabrication was supported by the contents of the appellant's cautioned statement which was substantially similar to the defence advanced. The failure on the part of the JC to consider and evaluate the appellant's cautioned statement constituted a serious non-direction which amounted to a misdirection, warranting appellate intervention. Such a misdirection was an appealable error. (para 14)

(4) Even if the JC were to direct himself correctly on the cautioned statement, he would not have come to the same irresistible conclusion in that the appellant knew the offending drugs were hidden in the boat. The appellant may have lost a chance which was fairly opened to him of being acquitted. As a result, there had been occasioned a failure or a miscarriage of justice which had the effect of rendering the conviction unsafe. (para 15)

Bahasa Malaysia *Translation Of Headnotes*

Sepasukan polis serbuan dan PW5 telah ke tempat kejadian untuk menjalankan operasi ke atas aktiviti pengedaran dadah. Sebelum itu, pihak polis telah menahan Yahya Zainol ('PW4') atas syak wasangka bahawa dia memiliki dadah berbahaya. Di balai polis, PW4 telah diminta untuk membeli ganja dan dia bersetuju. PW4 kemudian membuat panggilan telefon ke Thailand dan menghubungi seorang bernama 'Mail'. PW4 kemudian diberitahu oleh 'Mail' bahawa dadah akan siap untuk diambil di Kuala Perlis. Menurut PW5, sebuah bot dilihat menghampiri pelantar dan tiada orang lain dalam bot tersebut ketika itu kecuali perayu. Apabila bot itu berhenti di pelantar, PW5 dan pasukannya bergegas ke atas bot dan menahan perayu. Carian badan ke atas perayu mendedahkan

satu mampatan bahan tumbuhan kering yang disyaki kanabis dibungkus dalam bungkusan plastik lutsinar daripada beg yang dipakai pada pinggang perayu. Mengesyaki kandungannya adalah kanabis, PW5 merampasnya. Seterusnya, PW5 juga mendakwa bahawa perayu telah menunjukkan kanabis yang disembunyikan di dalam bot. Perayu kemudiannya dituduh dan dibicarakan di Mahkamah Tinggi bagi pengedaran dadah berbahaya, iaitu 937.5g kanabis, satu kesalahan di bawah Akta Dadah Berbahaya 1952 (‘ADB’). Di akhir kes pendakwaan, Pesuruhjaya Kehakiman (‘PK’) membuat dapatan bahawa pihak pendakwaan telah membuktikan kes *prima facie* terhadap perayu dan memanggil perayu untuk membela diri. Dalam pembelaannya, perayu mengakui bahawa dia mengetahui mengenai dadah yang dijumpai dalam beg berwarna coklat yang dipakai pada pinggangnya. Walau bagaimanapun, perayu dengan kerasnya menafikan pengetahuan atau telah menunjukkan kanabis yang disembunyikan dalam bot. Dalam menyokong pembelaannya, perayu mengemukakan kenyataan beramaran yang dibuat olehnya semasa siasatan polis. Walau bagaimanapun, PK pada penutup perbicaraan, menyabitkan perayu dan menjatuhkan hukuman mati mandatori ke atas perayu. Oleh itu, rayuan ini. Dalam rayuan ini, perayu berhujah bahawa PK gagal mempertimbangkan kenyataan beramaran perayu, yang mana bersifat pembuktian tidak bersalah. Selanjutnya dihujahkan bahawa kegagalan PK untuk mengambil kira kenyataan beramaran adalah tiada ketidakarahan serius yang terjumlah kepada salah arahan, menyebabkan sabitan perayu tidak selamat. Perayu juga menyatakan ‘Mail’ tidak pernah dipanggil oleh pihak pendakwaan dan walaupun perayu menyebut nama ‘Mail’ dalam kenyataan beramarannya, tiada siasatan dijalankan oleh pihak polis berkaitan dengan ‘Mail’. Dalam menentang rayuan ini, Timbalan Pendakwa Raya berhujah bahawa walaupun terdapat salah arahan oleh PK, namun tiada sebarang ketidakadilan yang substansial terhadap perayu dan terdapat bukti yang mencukupi yang mewajarkan sabitan.

Diputuskan (membenarkan rayuan; perayu dilepaskan dan dibebaskan)
Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

(1) Terdapat merit dalam hujahan perayu. Selaras dengan peruntukan s. 182A (1) Kanun Tatacara Jenayah, adalah menjadi kewajipan PK, di akhir perbicaraan, untuk mempertimbangkan semua keterangan yang dikemukakan di hadapannya. Badan perundangan telah menggunakan terma 'segala bukti'. Penekanan perlu diberi kepada perkataan "segala". Kenyataan beramaran yang dikemukakan oleh perayu adalah keterangan yang mana PK harus pertimbangkan untuk membuat dapatan sama ada pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah.

(2) PK mestilah mempertimbangkan sama ada kenyataan beramaran berkeupayaan membangkitkan keraguan munasabah ke atas kes pendakwaan dengan berhati-hati. Kenyataan beramaran perayu direkodkan sehari selepas penahanan perayu. Adalah penting untuk menunjukkan bahawa perayu ada menyebut fakta asas dalam pembelaannya pada peringkat awal semasa pihak polis menyiasatnya. Pembelaan perayu bukanlah sesuatu yang ditimbulkan buat kali pertama dalam kes pembelaan.

(3) Keterangan yang dikemukakan oleh pihak pendakwaan meninggalkan banyak persoalan yang tidak terjawab, terutamanya peranan 'Mail'. Fakta bahawa pembelaan perayu bukannya suatu rekaan baru disokong oleh kandungan yang terdapat dalam kenyataan beramaran yang serupa dengan pembelaan perayu. Kegagalan PK untuk menimbangkan dan menilai kenyataan beramaran perayu membentuk ketidakarahan yang serius yang terjumlah kepada salah arahan, yang mewajarkan campur tangan rayuan. Salah arahan sedemikian adalah kekhilafan yang boleh dirayukan.

(4) Walaupun PK mengarahkan dirinya dengan betul berdasarkan kenyataan beramaran tersebut, beliau tidak boleh mencapai kesimpulan yang tidak dapat disangkal bahawa perayu mempunyai pengetahuan mengenai dadah yang disembunyikan di dalam bot. Perayu mungkin kehilangan peluang yang agak terbuka kepadanya untuk dibebaskan. Kesimpulannya, terdapat kegagalan keadilan atau ketidakadilan yang mempunyai kesan menyebabkan sabitan tersebut tidak selamat.

Case(s) referred to:

Ahmad Mukamal Abdul Wahab & Ors v. PP [2013] 4 CLJ 949 CA ***(refd)***
Ayoromi Helen v. PP [2005] 1 CLJ 1 CA ***(refd)***
Ganapathy Rengasamy v. PP [1998] 2 CLJ 1 FC ***(refd)***
Lim Hock Boon v. PP [2007] 4 CLJ 114 CA ***(refd)***
Masoumeh Gholami Khaveh v. PP [2013] 5 CLJ 59 CA ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***

Mraz v. The Queen [1955] 93 CLR 493 ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
Tan Ewe Huat v. PP [2004] 1 CLJ 521 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60
Criminal Procedure Code, s. 182A(1)
Dangerous Drugs Act 1952, ss. 2, 39B(1)(a), (2)

For the appellant - S Vijaya Retnam; M/s Veizay & Co
For the prosecution - Tengku Amir Zaki Tengku Abdul Rahman; DPP

[Appeal from High Court, Perlis; Criminal Trial No: 45A-4-2010]

Reported by Sandra Gabriel

JUDGMENT

Azahar Mohamed JCA:

[1] Prasit Punyang ("the appellant"), was charged and tried in the High Court at Kangar for trafficking in dangerous drugs, namely 937.5g of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA"), and punishable under s. 39B(2) of the DDA. The offence was said to have been committed on 19 May 2010 at about 6.30pm in a boat at Pelantar Ikan Kampung Tandiap, Kuala Perlis, in the District of Kangar, in the State of Perlis.

[2] Learned Judicial Commissioner ("JC") at the conclusion of the trial convicted the appellant and sentenced him to the mandatory death penalty prescribed by the DDA. The appellant then appealed to this court. We heard his appeal, wherein at its conclusion we unanimously allowed it. We now give the reasons of our decision.

[3] The facts of the case, which learned JC held made out a *prima facie* case against the appellant, have been set out in his judgment. Very briefly, the facts adduced by the prosecution giving rise to the charge against the appellant were as follows. On 19 May 2010 at about 6pm, Inspector Zulpaka bin Aidiee ("PW5") and a police raiding team went to the Pelantar Ikan at Kampung Tandiap, Kuala Perlis to conduct an operation on drugs trafficking activities there. Earlier, the police had arrested one

Yahya bin Zainol ("PW4") on suspicion that he was in possession of dangerous drugs. PW4 was then brought to the police station. According to PW4, at the police station he was asked to buy cannabis and he agreed. In this regard, the material part of the evidence of PW4 is as follows:

> Di cawangan narkotik anggota narkotik telah buat pemeriksaan terhadap isteri saya dan telah jumpa sejenis ganja. Saya mengaku itu adalah milik saya, tapi anggota narkotik tidak mahu tahan saya tetapi mahu tahan isteri saya. Polis kemudian minta saya beli barang ganja. Saya setuju.
>
> Saya kemudian telefon ke Thailand. Saya berhubung dengan Mail. Saya beritahu saya mahu beli ganja sekilo.
>
> Mail suruh saya telefon balik.
>
> Pada hari itu pukul 4.00 petang saya telefon balik Mail. Mail suruh saya tunggu di Kuala Perlis untuk ambil barang.
>
> Harga satu kilo telah ditetapkan. Saya tidak ingat. Jumlah dalam RM20.00 lebih.

[4] As the facts unfolded, according to PW5, after about 15 minutes keeping watch, he saw a boat approaching the platform. No one else was in the boat at that point of time except the appellant. The boat then stopped at the platform. When the appellant was about to tie the boat at the platform, PW5 and his team rushed to the boat. PW5 then introduced himself as police and detained the appellant. According to PW5, he conducted body search on the appellant and found a slab of dried plant material wrapped in a transparent plastic packet from a bag worn at the waist of the appellant. PW5 suspected the dried plant material to be cannabis and he seized it. PW5 then asked the appellant whether he had in possession of any other drugs. Continuing with his evidence, this is what PW5 said:

> Selepas jumpai barang tersebut saya tanya kepada lelaki tersebut. Saya tahan lelaki tersebut dan rampas barang tersebut.
>
> Saya ada bercakap dengan lelaki tersebut. Hasil perbicaraan (*sic*) saya jumpai satu plastik berwarna kuning bertulisan Thailand bahagian belakang bot tersebut. Di dalamnya terdapat satu bungkusan plastik berwarna hitam mengandungi ketulan mampat daun-daun kering disyaki dadah berbahaya dibalut dengan plastik lutsinar dan aluminium fosil.
>
> P15C, D & E dirujuk dan dicamkan.

> Saya tanya lelaki tersebut kiranya dia ada simpan apa-apa dadah lain. Lelaki tersebut jawab ya dan terus tunjuk bahan ganja belakang bot tersebut. Selepas itu dia bawa saya ke belakang bot dan dia sendiri ambil bungkusan plastik warna kuning dan serahkan bungkusan tersebut kepada saya.

[5] Subsequently, the dried plant materials were sent to the chemistry department for chemical examination and analysis. The dried plant materials were confirmed by the chemist, Puan Maharyani binti Mat Saad ("PW1") to be cannabis as defined in s. 2 of the DDA, weighing in total 937.5g. This formed the subject matter of the present appeal.

[6] At the conclusion of the case for the prosecution, learned JC came to the finding that the prosecution had made out a *prima facie* case against the appellant and therefore called upon the appellant to enter his defence in respect of the offence charged. The appellant elected to give sworn evidence. The appellant admitted that he knew of the cannabis found in a brown bag worn at his waist. However, the appellant vehemently denied any knowledge of the presence of the cannabis hidden in the boat. The appellant denied that he pointed out to the police the place where the cannabis were hidden. The appellant, in support of his defence denying knowledge of the impugned cannabis, tendered a cautioned statement (exh. D1) that he made in the course of police investigation.

[7] When the appeal came before us, one of the main contentions of learned counsel for the appellant was that learned JC erred in failing to adequately consider the defence of the appellant. In particular, the point taken was that learned JC failed to consider the cautioned statement of the appellant, which is exculpatory in nature in so far as the present charge is concerned. Learned counsel argued that the failure on the part of learned JC to take into consideration the cautioned statement is a serious non-direction which amounts to a misdirection rendering the conviction of the appellant to be unsafe.

[8] On the facts of the present case, we find there is merit in the contention of learned counsel for the appellant. In accordance with the provisions of s. 182A(1) of the Criminal Procedure Code, it is the duty-bound of learned JC, at the conclusion of the trial, to consider all the evidence adduced before him and shall decide whether the prosecution has proved its case beyond reasonable doubt. The legislature has advisedly used the term "all the evidence". The emphasis must be on the word "all". In the context of the present case, the cautioned statement tendered by the appellant is one of the evidence which learned JC should take into consideration in order to make a finding whether or not the prosecution has proved its case beyond reasonable doubt. The aim of this provision is obviously to make certain that an accused person gets a fair trial. In the recent case of *Ahmad Mukamal Abdul Wahab & Ors v. PP* [2013] 4 CLJ 949, Hamid Sultan Abu Backer, JCA in delivering the judgment of this court has explained that the trial court has a duty and obligation to fairly and justly weigh the defence version and evidence (including the cautioned statement of the accused) or for that matter a story by the accused to reach a just result.

[9] It must be pointed out that in the cautioned statement, which was recorded on 20 May 2010, the appellant admitted that he was in possession of the cannabis found in a brown bag worn at his waist, but the appellant denied any knowledge of the presence of drugs hidden in the boat. This is what the appellant said in his cautioned statement:

> S: Cuba kamu ceritakan kepada saya kenapa kamu ditangkap polis?
>
> J: Pada 19/05/2010 jam lebih kurang pukul 1830 hrs, semasa saya tengah tengok orang baiki enjin di perahu sebelah, polis sampai, terus tangkap dan buat pemeriksaan pada badan saya seterusnya polis bawa saya ke perahu yang saya bawa tadi. Pihak polis telah menjumpai dadah dalam perahu yang saya bawa. Selepas itu mereka tahan dan bawa saya ke Balai Polis Kangar dan seterusnya saya ditahan di lokap hinggalah hari ini.
>
> S: Adakah kamu membawa apa-apa dadah?
>
> J: Ada, dalam beg pinggang saya.
>
> S: Apakah jenis dadah tersebut?
>
> J: Ganja.
>
> S: Adakah kamu jual dadah tersebut?
>
> J: Tidak.
>
> S: Bagaimana dadah tersebut boleh berada dalam beg pinggang kamu?
>
> J: Mail yang suruh saya hantar pada kawan dia di Kuala Perlis.

S: Adakah kamu kenal dengan kawan Mail?

J: Saya tak kenal.

S: Adakah kamu tahu ada dadah lain selain pada beg pinggang kamu?

J: Saya tidak tahu.

S: Macam mana dadah tersebut boleh berada dalam perahu?

J: Saya tak tahu. Cuma yang saya tahu pada beg pinggang yang saya pakai.

S: Adakah kamu menjalankan aktiviti penjualan dadah?

J: Tak.

S: Dadah yang kamu bawa, kepunyaan siapa?

J: Nama panggilan Mail.

S: Adakah kamu selalu hantar dadah ke Malaysia?

J: Tidak.

S: Adakah perahu tersebut kepunyaan kamu?

J: Tidak.

S: Siapakah tuan punya perahu tersebut?

J: Mail.

S: Di manakah Mail berada?

J: Pulau Puju Thailand.

S: Siapakah yang menjumpai dadah dalam perahu tersebut?

J: Polis.

S: Adakah kamu nampak polis tersebut menjumpai dadah dalam perahu?

J: Ya.

[10] There is no doubt that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the appellant for the offence with which he was charged. It never shifts. Whether the prosecution has proved its case beyond reasonable doubt depends upon the existence or otherwise of reasonable doubt in the evidence

adduced before the court. It is a question of fact that the court has to determine at the conclusion of the trial with great care after taking into consideration the entire evidence and the circumstances prevailing in the case. In *Mohamad Radhi Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311; [1991] 3 MLJ 169, the Supreme Court said as follows:

> To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice. It is not, however, wrong for the court to be convinced that the defence version is true, in which case the court must order an acquittal. In appropriate cases it is also not wrong for the court to conclude that the defence story is false or not convincing, but in that instance, the court must not convict until it asks a further question, that even if the court does not accept or believe the defence explanation, does it nevertheless raise a reasonable doubt as to his guilt?

[11] It is true that generally a self-serving or exculpatory cautioned statement is not in itself evidence of the truth asserted therein. But then, it is the duty of learned JC to consider and to analyse the cautioned statement that has been tendered as evidence by the appellant in support of his defence, that he had no prerequisite knowledge about the impugned cannabis found in the boat. Learned JC must consider carefully whether the cautioned statement is capable of raising a reasonable doubt on the prosecution case. The appellant's cautioned statement was recorded a day after the arrest of the appellant. It is important, therefore, to point out that the appellant had mentioned the basic facts of his defence at a very early stage of the police investigation against him. It follows from this that the defence of the appellant in the present case was not something that was sprung for the first time in the defence case (see: *Public Prosecutor v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285; [1992] 2 MLJ 561). The impact of the totality of the cautioned statement on the prosecution case or innocence of the appellant has to be kept in mind in coming to the conclusion as to the guilt of the appellant. However, in this case, learned JC in his judgment merely said "semasa di lokap OKT memberi percakapan beliau kepada polis yang dimasukkan sebagai DI" (see p. 529 appeal record). Tellingly, however, learned JC had failed to adequately direct his mind as to the truth of the appellant's version as stated in the cautioned statement (see: *Tan Ewe Huat v. PP* [2004] 1 CLJ 521).

[12] In opposing this appeal, the learned Deputy Public Prosecutor ("DPP") argued that even though there has been a non-direction on the part of learned JC concerning the cautioned statement, nevertheless that has not occasioned a substantial miscarriage of justice to the appellant and that there was sufficient evidence to justify the conviction.

[13] We are unable to agree with learned DPP's submissions. As a trial judge, learned JC had a duty to consider and scrutinise the cautioned statement and to make his own findings why even if he did not believe the cautioned statement, it did not raise a reasonable doubt on the prosecution's case as a whole (see: *Ganapathy Rengasamy v. Public Prosecutor* [1998] 2 CLJ 1; [1998] 2 MLJ 577). Learned JC did not make any specific finding on this important aspect of the defence. We do not have the benefit of learned JC's audio-visual advantage of hearing the evidence of the appellant to arrive at any factual finding on this issue.

[14] Moreover, for the proper determination of this issue, it is significant to note that PW4 is an important witness. He was asked by the police to purchase one kilogram of cannabis. He then contacted one "Mail" from Thailand for the supply of the cannabis. PW4 never contacted the appellant. "Mail" was never called by the prosecution. Although the appellant also mentioned the name of "Mail" in his cautioned statement, it appears that no investigation was carried out by the police pertaining to "Mail". Having examined the evidence led by the prosecution, we find the evidence left questions unanswered, especially the role of "Mail". It is against this backdrop, we are of the view that at the conclusion of the trial, learned JC should have properly addressed his mind in connection with the cautioned statement of the appellant in deciding whether the prosecution has proved its case beyond reasonable doubt. As stated earlier, in his defence, the appellant vehemently denied any knowledge of the presence of the cannabis hidden in the boat. The appellant also denied that he pointed out to the police the place where the cannabis were hidden. The fact that the defence is not a recent fabrication is supported by the contents of the appellant's cautioned statement which is substantively similar to his defence advanced (see: *Ayoromi Helen v. PP* [2005] 1 CLJ 1). It was then the duty of learned JC to consider the defence of the appellant in the light of the cautioned statement that he had given to the police a day after he was arrested. On the facts of the present case, the failure on the part of learned JC to consider and evaluate the appellant's cautioned statement constituted a serious non-direction which amounts to a misdirection, warranting appellate intervention. Such a misdirection is an appealable error.

[15] On the facts of the instant case, we are unable to conclude that even if learned JC were to direct himself correctly on the cautioned statement, he would have come to the same irresistible conclusion in that the appellant knew the offending drugs were hidden in the boat. Viewed in this way, the appellant may thereby have lost a chance which was fairly opened to him of being acquitted. As a result, there had been occasioned a failure or a miscarriage of justice, which has the effect of rendering the conviction very unsafe. (see: *Mraz v. The Queen* [1955] 93 CLR 493 quoted with approval in *Lim Hock Boon v. PP* [2007] 4 CLJ 114; [2007] 1 MLJ 46 and *Masoumeh Gholami Khaveh v. PP* [2013] 5 CLJ 59). For that reason, we do not agree with learned DPP that we should invoke the *proviso* to s. 60 of the Courts of Judicature Act 1964.

[16] This appeal was therefore, allowed. Accordingly, we quashed and set aside the conviction and sentence against the appellant. The appellant was acquitted and discharged.